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NO. 80-5861

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

KENNETH RAY WILLIAMS,

Petitioner

VS.

KENNETH RAY LUCKY,

Respondent

(IN THE INTEREST OF KENNETH RAY WILLIAMS)

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CIVIL APPEALS FOR
THE FIFTH SUPREME JUDICIAL DISTRICT OF
TEXAS

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QUESTION PRESENTED

WHETHER SECTION 13.01 OF THE TEXAS FAMILY CODE, WHICH LIMITS THE TIME AN ILLEGITIMATE CHILD CAN BRING A PATERNITY ACTION FOR THE PURPOSE OF SEEKING SUPPORT FROM HIS BIOLOGICAL FATHER TO ONLY THAT PERIOD BEFORE THE CHILD'S FIRST BIRTHDAY, DENIES PETITIONER THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE NO PATERNITY ACTION WAS BROUGHT FOR HIM UNTIL HE WAS FOURTEEN MONTHS OLD?

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NO. MISC.

KENNETH RAY WILLIAMS,

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS

TO : THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES:

KENNETH RAY WILLIAMS, petitioner herein, respectfully prays that a writ of certiorari issue to review the decision of the Court of Civil Appeals of the Fifth Supreme Judicial District of Texas, filed March 26, 1980, affirming the judgment of the 255TH District Court of Dallas County, Texas. In its opinion, the Court of Civil Appeals specifically upheld, upon direct attack by petitioner, the constitutionality of Section 13.01 of the Texas Family Code. On September 10, 1980, the Texas Supreme Court refused petitioner's application for writ of error (discretionary review) with the notation that the lower court's opinion contained "no reversible error".

OPINIONS BELOW

The opinion of the Texas Court of Civil appeals is reported at 599 S.W. 2d 108 (1980) and is annexed to this petition as appendix "A", infra. No opinion was written by the Supreme Court of Texas; the notation from that court denying petitioner's application for writ of error is annexed hereto as appendix "B", infra. The opinion of the Texas Court of Civil Appeals in Texas Department of Human Resources vs. Chapman, a related case involving an identical issue, is reported at 570 S.W. 2d 46 (1978) and annexed hereto as Appendix "C", infra.

JURISDICTION

Petitioner's application for writ of error (discretionary review) was denied by the Supreme Court of Texas on September 10, 1980. No application has been made for an enlargement of time to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

> Section 1 ***(N) or shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person wothin its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

TEX. FAM. CODE ANN. §13.01(Vernon Supp. 1980)

A suit to establish the parent - child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

STATEMENT OF FACTS AND PROCEEDINGS BELOW

Petitioner Kenneth Ray Williams, an illegitimate child, was born on August 21, 1977, in Dallas, Texas. Pursuant to the provisions of TEX. REV. CIV. STAT. ANN. Art. 695c, §18-B, petitioner's mother assigned his support rights to the Texas Department of Human Resources on July 21, 1978(tr.p.6) On October 25, 1978, the Department of Human Resources filed an "Original Petition to Establish Paternity of a child" in the 255th District Court of Dallas County, Texas.(tr.p.3) The petition asked that Kenneth Ray Lucky be adjudicated the biological father of petitioner and he ordered to provide for his support.

On December 7, 1978, respondent Lucky filed an Original Answer in the cause raising by special exception the defense of the one year statute of limitations applicable to all paternity actions as contained in Section 13.01 of the Texas Family Code (tr.p.8)

On January 31, 1979, the Judge of the 255th District Court appointed guardians ad litem to represent the interests ofKenneth Ray Williams. A petition in intervention on behalf of the child was filed by the guardians ad litem on February 7, 1979 (tr.p.12). An amended plea in intervention was filed on April 3, 1979 (tr.pp.16-21). This petition alleged that Kenneth Ray Lucky was the biological father of Kenneth Ray Williams; that Lucky had made oral statements admitting his paternity of the child; that he had contributed to the support of the child's mother during her pregnancy; that he had paid the expenses for the birth of the child; and that he was able to contribute to the support of the child (tr.p.17). Additionally, the amended petition alleged that Section 13.01 of the Texas Family Code denied Kenneth Ray Williams his rights as guaranteed him by the Equal Protection and Due Process clauses of the Fourteenth Amendment to the United States Constitution (tr.p.19).

By order dated August 1, 1979, the Judge of the 255th District Court dismissed with prejudice both the Original Petition to Establish Paternity and the Intervenor's Plea in Intervention (tr.pp.29-30). In its order, the Court concluded that both causes of action were barred by Section 13.01 of the Texas Family Code; that Section 13.01 did not violate the due process and equal protection clauses of the Fourteenth Amendment; that Section 13.01 is not tolled during the minority of the child; and that there is no non-statutory cause of action for paternity in Texas (tr.pp.29-30).

On appeal by intervenors on behalf of the child, the Court of Civil Appeals affirmed, Williams vs. Lucky, 599 S.W.2d 108(Tex. Civ. App.-Dallas 1980, writ ref'd n.r.e.). The court refused to limit or overturn its previous decision in Texas Department of Human Resources vs. Chapman, 570 S.W.2d 46(Tex. Civ. App.- Dallas 1978, writ ref'd n.r.e.)which had upheld the constitutionality of section 13.01 upon similiar facts. "We are compelled to hold" the court concluded, "that section 13.01 does not deny illegitimate children equal protection or due process of the law", Williams vs. Lucky, supra at 110.

REASONS FOR GRANTING THE WRIT

I.

SECTION 13.01 OF THE TEXAS FAMILY CODE DENIES PETITIONER AND OTHER ILLEGITIMATE CHILDREN THEIR RIGHTS AS GUARANTEED THEM BY THE DUE PROCESS AND EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

"We start from the premise that illegitimate children are not 'nonpersons'. They are humans, alive, and have their being", Levy vs. Louisiana, 391U.S. 68,88 (1968). With that premise and those words, this Court began to examine in a series of cases spanning the next decade, the extent to which states may classify and discriminate on the basis of illegitimacy. In Levy and its companion case, Glona vs. American Guarantee and Liability Insurance Co. , 391U.S. 73 (1968), the equal protection clause of the fourteenth amendment was first invoked to invalidate state restrictions on the right of illegitimate children and their mothers to maintain actions for wrongful death. The constitutional principle underlying these decisions was more fully developed in Weber vs. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), which contains probably the most quoted passage on the subject at issue:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual -- as well as unjust -- way of deterring the parent. 406 U.S. at 175.

In striking down a provision of the Louisiana Workman's compensation law that denied recovery rights to dependant, unacknowledged illegitimate children, the Court concluded that the statutory classification bore no reasonable relationship to any governmental interest or to the recognized purposes of the compensation law. Further, the court clarified the basis of its equal protection analysis by establishing a two-fold inquiry into the statute involved: "What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" 406 U.S. at 173 .

Before 1973, the state of Texas recognized no duty on the part of a natural father to support his illegitimate child, Home of Holy Infancy vs/ Kaska, 397 S.W.2d 208(Tex. 1965) Yet the natural father of a legitimate child had a continuing duty of support. In Gomez vs. Perez, 409 U.S. 535 (1973), this Court held that such a scheme invidiously discriminated against illegitimate children by denying them benefits accorded children generally:

> We therefore hold that once a state posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no conglitutionally sufficent justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is " illogical and unjust".

But the Court concluded its opinion with a passage that was specifically relied on by the Texas Court of Appeals in Chapman in upholding the statute at issue here:

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable barrier that works to shield otherwise invidious discrimination.

In Jimenez vs. Weinberger, 417 U.S. 628(1974), the Court held that a part of the statutory scheme of the Social Security Act violated the concept of equal protection because it discriminated against a sub-class of illegitimate children. Recognizing that the rationale for the classification -- the prevention of spurious claims -- is a legitimate governmental interest, the Court found that the two subclasses of illegitimate children stood on " equal footing" and that the potential for spurious claims was the same as to both classes.

In Mathews vs. Lucas, 427 U.S. 495(1976), the Court held that illegitimacy was not a "suspect" classification of so as to require application of the strict scrutiny test in it's equal protection analysis. But the specific level of scrutiny to be applied was more fully articulated in Trimble vs.

Gordon[1], 430 U.S. 762 (1977). "Despite the conclusion that classifications based on illegitimacy fall in a "realm of less strictest scrutiny' Lucas also establishes that the scrutiny is not a toothless one' ... a proposition clearly demonstrated by our previous decisions in the area", 430 U.S. at 767. In striking down on Illinois statute that prohibited illegitimate children from inheriting from their fathers by intestate succession, the Court again turned its attention to the problems of proof in adjudicating paternity:

> The more serious problems of proving paternity might justify a more demanding standard for illegitimate children claiming under their father's estates than that required either for illegitimate children claiming under their mothers' estates or for illegitimate children generally. We think, however, that the Illinois Supreme Court gave inadequate consideration to the relation between §12 and the State's proper objective of assuring accuracy and efficiency in the disposition of property at death. The court failed to consider the possibility of a middle ground between the extremes of complete exclusion and a case-by-case determination of paternity. 430 U.S. 770-771.

Thus central to the Court's determination that the classification was invalid was that it was not attuned to alternative considerations. "Difficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate", 430 U.S. at 772.

The Court in Trimble then turned its attention to the issue of the "insurmountable barrier" first raised in Gomez vs. Perez, supra.

> Despite its appearance in two of our opinions, the focus of the present or absence of an insurmountable barrier is somewhat of a analytical anomoly. Here, as in Labine, the question is the constitutionality of a state intestate succession law that treats illegitimate children differently from legitimate children. Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives.

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1 While not overruling Labine vs. Vincent, 401 U.S. 532 (1971), the Court's opinion in Trimble greatly restricted its "force as precedent" 430 U.S. at 767 n. 12. Yet the factual situations were so similar, four members of the Court found the cases constitutionally indistinguishable, 430 U.S. 777.

If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances.

Lalli vs. Lalli, 439 U.S. 259 (1978) concerned an equal protection challenge to a New York statute that allowed an illegitimate child to inherit from his intestate father only if a court of competent jurisdiction, during the father's lifetime,[2] had entered an order declaring paternity. Although there was no majority opinion, the statute was upheld: the plurality opinion concluded that the state statute was substantially related to a legitimate governmental interest.

The Texas Court of Civil Appeals fot the Fifth Supreme Judicial District analyzed many of the foregoing cases amd concluded that Section 13.01 of the Texas Family Code did not deny illegitimate children equal protection or due process of the law.[3] The court initiated its equal protection analysis by referring to admonition of Mathews vs. Lucas , supra, that illegitimacy is not a "suspect" classification. But the court then erronously concludes that the "pertinent analytical approach" is the rational basis test -- a conclusion not supported by any of Supreme Court cases heretofore discussed. Rather, based upon the language of the court both in Gordon and Lalli, it seem clear that the standard to be applied in scrutinizing classifications based on illegitimacy is the "substantial realtionship" test, U.S. vs. Clark, _____ U.S._____ (1980).

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2 The statute involved in Lalli actually contained a requirement that the paternity ajudication be made during the pregnancy of the mother or within two years from the birth of the child. However, since the appellant in the case never commenced a paternity action, this court obviated a ruling on the constitutionality of the limitation period by construing the child's right to seek paternity to any time during the lifetime of the father, Lalli vs Lalli:, 439 U.S. at.n.5. Of course, the issue avoided in Lalli is squarely presented in this case.

3 The Appeals Court in the case at bar simply reaffirmed its previous decision in Texas Department of Human Resources vs. Chapman, 570 S.W.2d 46(Tex. Civ. App. 1978), which contains the Constitutional analysis described above.

Secondly, the Court narrowly construed the holding in Gomez to the effect that a state may not "absolutely foreclose" the right of an illegitimate chils to receive support from his natural father. Finding that the one year statute of limitations does not create the fatal "impenetrable barrier", the court concludes that Section 13.01 relates only to remedies and does not destroy fundamental rights. Explaining the objectives underlying the statute, the Court States:

> The purpose of statute of limitations is to compel exercise of rights within a reasonable time, so as to afford the opposing party a fair opportunity to defend while the evidence is readily available.(citations omitted) It may be that the legislature has concluded that the longer the period between birth and suit, the greater the danger of fraud. At the very least, the defendant's problems of proof are substantially increased with the passage of time.

Petitioner submits that Section 13.01 is constitutionally defective for several reasons. First the statute, like the classification involved in Jiminez vs. Weinberger, supra, discriminates against a subclass of illegitimates--those who do not have a paternity action brought in their behalf within one year from their birth. Secondly, again as in Jiminez, the statute is both over-inclusive and under-inclusive. It assumes, without authority, that all suits brought after one year have a greater propensity to be fraudulent than those brought within a year of the child's birth. There is simply no evidence that that proposition is correct. Fradulent suits can easily be brought within the one year period the same as meritorious claims can be barred because not initiated until after the child's first birthday.

Thirdly, the statute is not carefully tuned to alternative considerations, Trimble vs. Gordon, supra. For example, Section 13.02 of the Texas Family Code presents a much less restrictive means of eliminating fradulent or spurious claims--the utilization of blood testing. [4]

4 Such tests, properly conducted, have a success percentage in excluding wrongfully accused men of anywhere from 70% to 95%; see, generally, Lee, Current Status of Paternity Testing, 9 Fam. L.Q. 615, 633 (1975), Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage, 10 Fam. L.Q. 247, 257; Shaw and Kass, Illegitimacy, Child Support and Paternity Testing, 13 Houston L. Rev. 41 (1975).

With other evidence of paternity or non-paternity, the probabilities of a just and accurate verdict increase proportionately. Another alternative consideration other than the complete exclusion of all claims brought after the statutory period could be to increase the petitioner's burden of proof.

Petitioner also asserts that the effect of Section 13.01 of the Texas Family Code is to deny him due process of law in that his rights to a paternity determination, the predicate to his right to parental support, is inextricably tied to the willingness of his mother or guardian to assert his rights within the perscribed time. The right of an illegitimate child to assert a claim for parental support is much too fundamental to permit its forfeiture by the mother or guardian's failure to initiate a paternity action within one year of his birth.

II.

STATE COURTS, BASING THEIR DECISIONS ON THE FEDERAL CONSTITUTION AND THE CITED OPINIONS OF THIS COURT, ARE BADLY DIVIDED ON THE QUESTION AT ISSUE IN THIS CASE; A FINAL AND DEFINITIVE RESOLUTION IS NECESSARY

In the last decade, courts in many states across the country have confronted the constitutional issue involved in this case. And although the courts are divided, the decision of the Texas Court of Civil Appeals seems to contravene the recent trend of authority.

The line of cases upholding the constitutionality of statute of limitations in paternity actions begins with In re People in Interest of L.B., 498 P.2d 1157(Colo.1972) cert. denied, 410 U.S. 976 (1973). Here, the Colorada Supreme Court upheld the state's five year statute on the basis that "the difference in the two situations (the legitimate child vis-a-vis the illegitimate child) and the uncertainty of relationship attendant on illegitimacy justify treatment as two different classes for consittutional purposes." However, the decision must be viewed in historical perspective; Weber vs. Aetna Casualty & Surety Co., supra, had come down a mere two months before the Colorado decision was announced.

In Cessna vs. Montgomery, 63 Ill. 2d 71, 344 N.E. 2d 447 (Ill. 1976), the Illinois Supreme Court held that the state's two year limitation upon the institution of paternity actions was valid. In probably what is the most exhaustive opinion in this line of authority, the Court reviewed and briefly explained every Supreme Court decision from Levy to Jiminez and concluded that the statute could withstand both an equal protection and due process challenge:

> Illegitimate children differ fundamentally from legitimate children in that at birth they have no legal relationship to their natural father. In the language of equal protection analysis, legitimate and illegitimate children are not similarly situated classes, ...Plaintiffs imply that any limitation period is inconsistent with due process. We disagree. No Supreme Court case has indicated, and Gomez cannot be read to require, that illegitimates be given an unrestricted right throughout their minority to bring a paternity action. The state has a legitimate interest in preventing the litigation of stale and fraudulent claims. 344 N.E.2d at 452.

The Court was not persuaded by the arguement that the child's mother could have an adverse interest to the child's in making a determination whether or not to bring a paternity action, concluding instead that the mother is ordinarily in the best position to make that decision.

The Iowa two year statute was upheld in Krupke vs. Witkowski, 256 N.W.2d 216 (Iowa, 1977). The Court here relied heavily on (and quoted extensively from) the opinion in Cessna vs. Montgomery, supra. "We agree with the rationale of the Cessna case for it recognizes that until the proof of parentage is proved the putative father has no fixed obligation to support the child." By way of meeting the "alternative consideration" standard of Gordon vs. Trimple, supra, the court further noted that the Iowa statute contained three specific expections to an absolute bar to establishing paternity during the two year period.

Maryland's two year statute was upheld in Thompson vs. Thompson, 404 A.2d 269 (Md. App. 1979) affirming 390 A 2d 1139 (Md. Sp. App. 1978). Here the court emphasized the purpose of the limitation -- the prevention of stale claims - justified any discrimination against legitimates. "After the lapse of a number of years from contact with the mother of an illegitimate child, an accused male might have substaintial difficulty in establishing that he was not the only individual who could have sired the child in question." The court also discussed the trustworthiness of blood tests but expressly took no cognizance of their reliability or the possible effect on the statute in question because no evidence was offered to establish the general acceptance of such tests in the general field in which they are utilized.

A second line of cases never reaches the precise constitutional question at issue here because, for various reasons, the statute of limitations involved does not bar the action by a minor child. Thus in Palmer vs. Mangum, 338 So. 2d 1002 (Miss. 1976) and Huss vs. DeMott, 524 P2d 743 (Kan. 1974), the statutory action (and thus the statutory limitation) was construed to apply only to the mother while the child could bring an action throughout his minority. In Perez vs. Singh, 97 Cal. Rptr. 920 (Ct. App. Cal. 1971), the child's minority tolled the statute. In

Nielsen vs. Hansen, 564 P 2d 1113 (Utah, 1977), the eight year statute was found not to apply to paternity actions. And in Kaur vs. Chawla, 522 P2d 1198 (Ct. App. Wash. 1974), the statutory action was found not to be exclusive of the common law right of the child to sue throughout his minority. "But if the filiation were the exclusive remedy, a prosecuting attorney or a mother could deny an illegitimate child access to the court. Such a denial would violate the child's constitutional rights to due process", 522 P2d at 1201.

The line of cases striking down statutes of limitation in paternity actions begins relatively recently with Stringer vs. Dudoich, 583 P2d 462 (N. Mex. 1978). Relying on Gomez vs. Perez, the court first noted that New Mexico had no time limitation on the right of a legitimate child to obtain support from his father. "If there is no limitation on the right of a legitimate child to seek support from his parent, then there can be no limitation on the same right for an illegitimate child", 583 P2d at 464.

Probably the most exhaustive and detailed opinion on the subject was written by the Supreme Court of Florida in State Dept. of Health vs. West, 378 So. 2d 1220 (Fla. 1979). The court briefly examines every Supreme Court case touching on illegitimacy and concludes that the state's four year limitation period denies illegitimate children the equal protection of the laws.

> The state's objective to avoid stale claims, however, is not valid justification for the discrimination it inflicts on illegitimates since their right to support is a continuing right renewing itself until the child reaches eighteen. An action to determine paternity is not a stale claim when employed as a prerequisite to an illegitimate's obtaining of continuing, recurring support. This right has never become dormant, and for the statute of limitations to act to preclude this right on the basis that it is stale is illogical.

Turning its attention to the purported problems of proof in the absence of a limitation period, the court stated:

> Furthermore, this statute bears at best a tenuous relatinship to the interest it seeks to advance of ensuring the availability of adequate proof of paternity. The arbitrary determination that paternity can only be proved in four years creates an impenetrable

> barrier to an illegitimate child's right to seek support without considering alternatives which deal directly with the problems of proof. Although proof of paternity may become more difficult with the passage of time, this mere possibility cannot be allowed to work an unconstitutional discrimination against illegitimate children, 378 So. 2d at 1229.

The three year North Carolina statute of limitations was recently struck down in County of Lenoir ex rel Codgell vs. Johnson, 264 S.E. 2d 817 (N.C. Ct. App. 1980). The Court found that the statute was not substantially related to the state's interest in preventing stale or fradulent claims. Further, the court questioned the need for statute of limitations in light of advances in blood typing, which have been determined to be approximately 95% accurate in determining a defendant's lack of paternity.

It is ironic tht the division that exists among states in regard to this constitutional issue is no more extreme than the division that now exists within the Texas appellate system. The Fort Worth Court of Civil Appeals has recently ruled that Section 13.01 of the Texas Family Code is unconstitutinal -- a decision that puts it in direct conflict with the Dallas Court of Appeals in this case and in Texas Department of Human Resources vs. Chapman, 570 SW2d 46 (Tex. Civ. App. 1978). The Court in In the Interest of Miller, 605 S.W.2d 332 (Tex. Civ. App. 1980) expressly rejected the reasoning of Chapman[5] and ruled that Section 13.01 violates the equal protection clause of the fourteenth amendment because it applies only to suits for paternity with no corresponding limitation being applicable to suits for maternity. The Fort Worth court also found a violation of due process because it authorized the mother to forfeit the rights of the child.

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[5]The Court in Miller noted in its opinion that the application for writ of error to the Texas Supreme Court in Chapman had been refused with the notation "no reversible error" but did not explain -- perhaps understandably -- that this notation signifies that the Supreme Court approves of the result of the lower appellate court. See, Burchfield vs. Markham, 294 A.W.2d 795 (Tex. 1956).

With the extreme division of judicial authority that now exists on this question, this Court should grant certiorari to finally resolve these conflicts.

III.

THIS CASE ULTIMATELY INVOLVES THE RIGHT OF SUPPORT FOR THOUSANDS OF CHILDREN UNDER THE AGE OF EIGHTEEN

Illegitimate births accounted for an estimated 14.7% and 15.5% of all births in the United States in the years 1976 and 1977 respectively, National Center for Health Statistics of the Department of Helath, Education and Welfare, Monthly Vital Statistics Report, Feb. 5, 1979; id March 29, 1978 at 17. This represents 468,100 and 515,700 total illegitimate births in those two years. The problem of illegitimacy is particularly acute in urban areas. In 1975, over one-half of all births in the District of Columbia were out of wedlock, National Center for Health Statistics of the Department of Health, Education and Welfare, I Vital Statistics of the United States (Natality), 1975, at p.50. In 1973, there were 112,703 illegitimate A.F.D.C. recipients in the State of Texas; this number represented a 775% increase in the number of illegitimates on AFDC since 1961, Wage Garnishment, attachment, and Establishment of Paternity, Senate Committee on Finance, pp.215-216 (U.S. Government Printing Office, 1975). A decision by the Supreme Court in this case would ultimately determine the support rights for thousands of these children, many of whom who are now on welfare or are receiving no support at all. For this reason, petitioner would urge this court to grant certiorari in this cause to determine the rights these children have.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

This the 8th day of December, 1980.

Respectfully submitted,

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By: Lawrence L. Mealer
LAWRENCE L. MEALER

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

This is to certify that I have on this day served a copy of the attached Petition for a Writ of Certiorari to to attorney for Respondent, Mr. Mike Aranson, 600 Jackson St., Dallas, Texas 75202, by depositing same in the United States Mail, postage prepaid, this 8th day of December, 1980.

Lawrence L. Mealer
LAWRENCE L. MEALER

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 20234

KENNETH RAY WILLIAMS, BY AND THROUGH SHEILA ANN O'CONNOR AND GEORGE M. MOOD, AS GUARDIANS AD LITEM,

APPELLANT

VS.

KENNETH RAY LUCKEY,

APPELLEE

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

BEFORE JUSTICES ROBERTSON, CARVER AND HUMPHREYS
OPINION BY JUSTICE ROBERTSON
MARCH 26, 1980

Kenneth Ray Williams appeals from the trial court's action in holding that his cause of action to establish paternity was barred by the statute of limitations, TEX. FAM. CODE ANN. § 13.01 (Vernon Supp. 1980), and in dismissing the suit.[1]

---

[1] This was originally a suit to establish paternity and liability for support instituted by the Texas Department of Human Resources under an assignment of support rights executed by Williams' mother. The child intervened by and through his guardians ad litem and is the only party appealing the trial court's judgment.

We hold that section 13.01 is not subject to any tolling provisions and that it is not unconstitutional as a denial to

illegitimate children of equal protection or due process. Accordingly, we affirm.

Kenneth Ray Williams was born on August 21, 1977, and this suit was filed on October 25, 1978. Section 13.01 of the Texas Family Code reads as follows:

> A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

Appellant contends that this section is subject to the same tolling provisions as all other Texas statutes, see TEX. REV. CIV. STAT. ANN. art. 5535 (Vernon Supp. 1980),[2] and therefore,

---

[2]This article provides as follows:

> If a person entitled to bring any action mentioned in this subdivision of this title be at the time the cause of action accrues either a minor, a married person under twenty-one years of age, a person imprisoned or a person of unsound mind, the time of such disability shall not be deemed a portion of the time limited for the commencement of the action and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title. [Emphasis added].

---

that an action to establish paternity brought in a child's right is tolled during its minority. Appellee counters that the language of article 5535 is self-limiting and does not apply to section 13.01 of the Texas Family Code.

We agree with appellee. The language of article 5535 specifically limits its effect to "any action mentioned in this subdivision of this title," and since the Texas Family Code is not in that subdivision, the tolling provisions do not apply to it. Further, no provisions exist within the Texas Family Code for tolling section 13.01. Cf. Texas Department of Human Resources v. Delley, 581 S.W.2d 519, 521 (Tex. Civ. App. - Dallas 1979, no writ) (four year limitation, TEX REV. CIV. STAT. ANN. art. 5529 (Vernon 1958), on paternity suits concerning children born prior to enactment of section 13.01, tolled by general disability statute, id. art. 5535 (Vernon Supp. 1980)).

Further, principles of statutory construction would favor our holding that section 13.01 is not tolled. The dominant consideration in determining the meaning of a statute is the intent of the legislature in enacting the provision. The language of the statute itself is the primary evidence of intent. Jones v. Del Andersen & Associates, 539 S.W.2d 348, 350 (Tex. 1976). The language in section 13.01 evidences an intent that this limitation apply to any suit to prove paternity regardless of who brings it. Moreover, we must presume that the legislature was aware of the scope of existing tolling provisions at the time that it enacted section 13.01, and understood that no such provisions would apply to it. Allen Sales & Servicenter, Inc. v. Ryan, 525 S.W.2d 863, 866 (Tex. 1975). While we may not agree with the policy considerations given effect in certain statutes, our function is not

to question the wisdom of the legislative enactment, but, absent constitutional infirmities, to apply the statute as written.' Jones v. Del Andersen & Associates, 539 S.W.2d at 351. Accordingly, we hold that section 13.01 is not tolled as to appellant's cause of action to establish paternity.

Appellant next contends that the trial court erred in failing to find that illegitimate children have a nonstatutory right to support in Texas. Appellant apparently requested this finding in an attempt to establish a cause of action to which section 13.01 would not apply. Regardless of how the trial court ruled on this request, however, section 13.01 barred appellant's suit for paternity, which was a necessary prerequisite to his action for support against appellee. Thus, any error which may have occurred in the trial court's failure to find as appellant requested was harmless.

Finally, appellant challenges section 13.01 as being unconstitutional because it denies illegitimate children equal protection and due process. Appellant recognizes that this court has previously found section 13.01 to be constitutional in the face of these same challenges. See Texas Department of Human Resources v. Chapman, 570 S.W.2d 46 (Tex. Civ. App. - Dallas 1978, writ ref'd n.r.e.). Nevertheless, he requests that we consider our holding therein, and overrule it or limit its application to suits brought by someone other than the child. While the paternity suit in Chapman was instituted under an assignment of right from the mother, the opinion did not turn

on who brought the suit; rather, the analysis was based on whether the illegitimate child's constitutional rights had been violated. That is precisely the question before us in this action. Appellant has urged no arguments not presented to us by the parties in Chapman, and has cited no new authority which persuades us that our prior decision was erroneous. Based on the fact situation presently before us, as well as that before us in Chapman, we are compelled to hold that section 13.01 does not deny illegitimate children equal protection or due process of the law.

Accordingly, we affirm the trial court's judgment.

TED Z. ROBERTSON
ASSOCIATE JUSTICE

JUDGMENT

COURT OF CIVIL APPEALS

FIFTH JUDICIAL DISTRICT

DALLAS COUNTY, TEXAS

NO. 20234

Kenneth Ray Williams, By and Through Sheila Ann O'Connor and George M. Mood, as Guardians Ad Litem	§	From a District Court
vs.	§	Of Dallas County, Texas
Kenneth Ray Luckey	§	Wednesday, March 26, 1980

BEFORE JUSTICES ROBERTSON, CARVER AND HUMPHREYS
OPINION BY JUSTICE ROBERTSON

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of the Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; in as much as appellant, Kenneth Ray Williams, By and Through Sheila Ann O'Connor and George M. Mood, as Guardians Ad Litem, are not required by statute to post an appeal bond, no costs are accesed against said appellant, this decision is hereby certified to the Court below for observance.

CLERK'S OFFICE - SUPREME COURT

Austin, Texas Sept. 10, 1980

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of WILLIAMS v. LUCKY, No. B-9511

was this day refused. No reversible error.

Very truly yours,
CARSON R. JACKSON, Clerk

APPENDIX "B"

COURT OF CIVIL APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 19558

TEXAS DEPARTMENT OF HUMAN RESOURCES,
APPELLANT

VS.

RICKY L. CHAPMAN,
APPELLEE

FROM A DISTRICT COURT

OF DALLAS COUNTY, TEXAS

The Texas Department of Human Resources sued Ricky L. Chapman under the provisions of Section 13.01 et seq. of the Texas Family Code to establish a parent-child relationship between Chapman and an illegitimate child. The department brought the action under an assignment from the child's mother. Chapman filed a plea in bar asserting that the suit was barred by the statute of limitations set forth in Section 13.01 of the Texas Family Code, which provides that a suit to establish the parent-child relationship between an illegitimate child and the alleged natural parent must be brought within one year from the birth of the child. The trial court sustained the plea and dismissed the cause. We affirm.

The initial question on this appeal is whether the one-year statute of limitations set forth in Section 13.01 of the Family Code[1] invidiously discriminates between illegitimate children so as to deny them equal protection of the law. If we conclude that it does not, we must then decide whether the statute denies illegitimate children due process of law.[2]

---

[1] Section 13.01 provides:

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

APPENDIX "C"

[2]Since the child was born in January, 1974, and this suit was not filed until February, 1977, it is undisputed that Section 13.01, if constitutional, bars the present action.

Equal Protection

The Department first argues that Section 13.01 invidiously discriminates against illegitimates and thereby denies them equal protection of the law. Before deciding this question, we must first determine the applicable standard of constitutional review. Although the Department urges that classifications based on illegitimacy are "suspect" and must be subjected to "strict scrutiny," we cannot apply that standard. In Mathews v. Lucas, 427 U.S. 495 (1976), the United States Supreme Court rejected the argument that illegitimacy is a "suspect" classification. According to the court, such classifications are "in the realm of less than strict scrutiny." Thus, the pertinent analytical approach is whether the statute bears a rational relationship to a legitimate governmental interest. Mathews v. Lucas, supra, at 505-510.

With the proper perspective established, we next consider the case of Gomez v. Perez, 409 U.S. 535 (1973), which forms the foundation of the Department's constitutional attack. In Gomez, the supreme court invalidated a Texas statute which granted support rights to legitimate children but denied that right to illegitimates. The court concluded that the statute violated the constitutional guarantee of equal protection, stating:

> [O]nce a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers, there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. (409 U.S. at 538)

As this language indicates, a state may not absolutely foreclose the right of an illegitimate child to receive support from the natural father. Indeed, the court recognized the narrowness of its holding in Gomez by stating:

> We recognize the lurking problems with respect to proof of paternity. Those problems are not to be brushed lightly aside, but neither can they be made into

an impenetrable barrier that works to shield otherwise invidious discrimination. (409 U.S. at 536)[Emphasis added]

In the present case, however, the challenged statute is not an "impenetrable barrier" to an illegitimate child's right to support. The statute does not prohibit a suit for support; rather, the statute simply sets forth a time period within which the suit must be brought. As a matter of constitutional law, statutes of limitations relate to remedies, and do not destroy fundamental rights. Cathey v. Weaver, 193 S.W. 490 (Tex. Civ. App. - Austin 1917), aff'd 242 S.W. 447 (1917); Lucia v. United States, 474 F.2d 565 (5th Cir. 1973). Accordingly, we conclude that the present case is not controlled by Gomez, and that our ultimate decision must be based upon whether this limitation on the remedy afforded an illegitimate child is constitutionally deficient.

It cannot be denied that proof of paternity places a burden upon illegitimates which is not shared by legitimate children; however, such a proof requirement is an unavoidable and indispensible element of the child's claim for support. See KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 82 (1971); note, Illegitimacy and Equal Protection, 49 N.Y.U.L. REV. 479, 511 (1974). Legitimate and illegitimate children are not similarly situated classes. Illegitimate children are fundamentally different from legitimate offspring, for at birth, they have no legal relationship to their natural father. Therefore, it is not only reasonable but essential that the state require proof of paternity as a condition of asserting an otherwise equal support right. Cessna v. Montgomery, 63 Ill.2d 71, 344 N.E.2d 447 (1976); Krupke v. Witkowski, 256 N.W.2d 217 (Iowa 1977). The question presented here is whether a requirement that this proof be made within one year from the birth of the child is reasonably related to a legitimate state interest. We conclude that it is. No supreme court case has held that illegitimates must be given an unrestricted right throughout their minority to bring a paternity suit. The state has a legitimate interest in preventing the litigation of stale or fraudulent claims. The purpose of statutes of limitation is to compel exercise of rights within a reasonable

time, so as to afford the opposing party a fair opportunity to defend while the evidence is readily available. Price v. Anderson Estate, 522 S.W.2d 690 (Tex. 1975); Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967). It may be that the legislature has concluded that the longer the period between birth and suit, the greater the danger of fraud. At the very least, the defendant's problems of proof are substantially increased with the passage of time. It has long been held that the legislature, not the courts, is entrusted with the responsibility of considering the public interest of this state regarding limitation of actions. See Williams v. Reed, 160 S.W.2d 316 (Tex. Civ. App. - San Antonio 1942, writ ref'd); Bean v. J. I. Case Threshing Machine Co., 221 S.W. 634 (Tex. Civ. App. - Amarillo 1920, writ ref'd). With respect to paternity actions, the legislative discretion is not subject to judicial review unless the prescribed period is so short as to be tantamount to the "impenetrable barrier" proscribed in Gomez. See Cessna v. Montgomery, supra; Krupke v. Witkowski, supra. A one-year limitation is not insurmountably brief, and although the forfeited right is important, this court is not empowered to invalidate legislative enactments based on our own policy concepts of what a reasonable time would be.

In view of the legitimate state interest in precluding the litigation of stale or fraudulent claims, and the fundamental differences between proving paternity of legitimate and illegitimate children, we conclude that Section 13.01 does not deny illegitimate children equal protection of the law.[3]

---

[3] We do not consider whether the various tolling provisions set forth in the Texas Revised Civil Statutes are applicable to extend the period within which a paternity suit may be filed.

Due Process

The Department next contends that Section 13.01 is constitutionally deficient in that it denies illegitimate children due process of law guaranteed under the Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the

Texas Constitution. It asserts that the illegitimate child's rights to paternity determination and support are impermissibly tied to the willingness and ability of the mother to assert those rights within the prescribed time. According to the Department, the interests of the mother do not always coincide with that of the child, for she may choose not to sue for fear of publicity or in consideration of her continued affection for the child's father. The failure to provide for alternate representation is challenged, and numerous statistics are presented to demonstrate the hardship this provision visits upon the poor, who cannot easily afford paternity suits. However meritorious these considerations may be as matters of policy, they do not rise to the level of constitutional argument. In our judgment, the legislature could reasonably conclude that the support right of an illegitimate child is best protected by requiring the suit to be brought by the mother, and that the potential harm to putative fathers defending stale or fraudulent claims is, on balance, greater than the potential harm to illegitimate children whose support right is forfeited by the mother's inaction. In re People in Interest of L. B., 179 Colo. 11, 498 P.2d 1157 (1972), cert. denied, 410 U.S. 976 (1973); Krupke v. Witkowski, supra; Cessna v. Montgomery, supra. Accordingly, we hold that Section 13.01 does not deny illegitimate children due process of law under the Fourteenth Amendment or the Texas Constitution.

The Department's final argument is that Section 13.01 violates the due process clause of the Fifth Amendment to the United States Constitution by treating subclasses of illegitimates differently. It asserts that while the statute allows illegitimates who are legitimized within one year of birth to recover support, it denies that right to those who are not timely legitimized. In support of this argument, the Department cites Jimenez v. Weinberger, 417 U.S. 628 (1974), which holds that to "conclusively deny" one subclass benefits available to another violates the due process clause of the Fifth Amendment. We cannot accept this contention, for the present statute does not "conclusively deny" any illegitimate child the right to support;

rather, the statute merely sets forth a time period within which the right to support must be asserted. The right to support is thus preserved for all illegitimates, provided, of course, that the paternity suit is filed within the prescribed period. Such a procedural prescription is not a denial of due process, but rather a statutory scheme which, if adhered to, provides due process to all illegitimate children. Therefore, we conclude that Section 13.01 does not violate the due process clause of the Fifth Amendment.

Affirmed.

TED Z. ROBERTSON
ASSOCIATE JUSTICE

DELIVERED:
June 28, 1978

GUITTARD, C. J. NOT PARTICIPATING

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

NO. 80-5861

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SUPREME COURT, U.S.

KENNETH RAY WILLIAMS)
Petitioner,)
)
vs.)
)
KENNETH RAY LUCKEY,)
Respondent)
)

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Kenneth Ray Williams, petitioner herein, respectfully applies for permission to proceed in forma pauperis in connection with the petition for writ of ceriorari to the United States Supreme Court previously filed by petitioner. The affidavit of petitioner's guardian ad litem in support hereof is attached hereto.

This the 8th day of December, 1980, Dallas, Dallas County, Texas.

RESPECTFULLY SUBMITTED:

DALLAS LEGAL SERVICES FOUNDATION, INC.
810 Main Street, Suite 320
Dallas, Texas 75202

(214) 742-1631

By: Lawrence L. Mealer
LAWRENCE L. MEALER
ATTORNEY AT LAW

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1980

NO. 80-5361

KENNETH RAY WILLIAMS,
Petitioner,

vs.

KENNETH RAY LUCKEY,
Respondent

AFFIDAVIT OF SHEILA ANN O'CONNOR

IN SUPPORT OF

PETITIONER'S APPLICATION TO PROCEED IN FORMA PAUPERIS

STATE OF TEXAS X
X
COUNTY OF DALLAS X

I, SHEILA ANN O'CONNOR, being first duly sworn according to law, depose and say in support of the application of KENNETH RAY WILLIAMS for leave to proceed without prepayment of costs or fees, as follows:

1. I am an attorney licensed to practice law in the State of Texas;

2. By order of the 255th Judicial District Court of Dallas County, Texas of January 31, 1980, I was appointed Guardian Ad Litem to represent in this suit the interests of KENNETH RAY WILLIAMS, an illegitimate child born August 21, 1977.

3. I am familiar with the economic circumstances of KENNETH RAY WILLIAMS and those of this mother, OLLIE RUTH WILLIAMS;

4. Because of the poverty of KENNETH RAY WILLIAMS and his mother, they are financially unable to pay the fees and costs of this cause;

5. Similarly, because of the poverty of KENNETH RAY WILLIAMS and his mother, they are unable to give security for the same, or pay for the costs of printing any briefs.

FURTHER AFFIANT SAITH NOT:

Signed this 4th day of December, 1980.

SHEILA ANN O'CONNOR
GUARDIAN AD LITEM FOR KENNETH RAY WILLIAMS

STATE OF TEXAS X
X
COUNTY OF DALLAS X

Sworn to and subscribed before me by SHEILA ANN O'CONNOR on this the 4th day of December, 1980.

NOTARY PUBLIC IN AND FOR DALLAS, COUNTY, TEXAS

My commission expires: December 31, 1980

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5861

KENNETH RAY WILLIAMS,

Petitioner

VS.

KENNETH RAY LUCKY,

Respondent

(IN THE INTEREST OF KENNETH RAY WILLIAMS)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS

RESPONDENT'S MEMORANDUM IN OPPOSITION

MIKE ARANSON
Attorney for Respondent

LAW OFFICES OF MIKE ARANSON, P.C.
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600 JACKSON STREET
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO. 80-5861

KENNETH RAY WILLIAMS,

Petitioner

VS.

KENNETH RAY LUCKY,

Respondent

(IN THE INTEREST OF KENNETH RAY WILLIAMS)

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS

RESPONDENT'S MEMORANDUM IN OPPOSITION

The Respondent KENNETH RAY LUCKY respectfully requests that this Court deny the petition for writ of certiorari.

REASON WHY THE WRIT SHOULD BE DENIED

1. This Court lacks jurisdiction to hear this case.

Title 28 U.S.C. §1257 provides in part:

> Final judgments or decrees rendered by the highest Court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (3) By writ of certiorari, where the validity of a . . . State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States . . .

This finality requirement serves several ends:

(1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or controversy" in the real sense of Article III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs. North Dakota Pharmacy Bd. v. Snyder's Stores, 414 US 156, 38 L.Ed 2d 379, 94 S.Ct. 407.

There presently exists a division within the Texas appellate system regarding the issue sought to be litigated here. Texas Dept. of Human Resources v. Chapman, 570 SW2d 46 (Tex.Civ.App. 1978) has upheld Section 13.01 of the Texas Family Code, while In the Interest of Miller, 605 SW2d 332 (Tex.Civ.App. 1978) has held the section unconstitutional.

The Supreme Court of Texas now has before it the question sought to be posed to this Court. The Supreme Court of Texas heard oral arguments in the Miller case (styled In the Interest of J. A. M. in the Supreme Court, and numbered B9871) on the 25th day of February, 1981.

Since the requirements of Title 28 USC §1257 have not been satisfied, the petition for a writ of certiorari should be denied.

CONCLUSION

This court lacks jurisdiction to grant the writ of certiorari.

Respectfully submitted,

LAW OFFICES OF MIKE ARANSON, P.C.

MIKE ARANSON
State Bar No. 01283000

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Supreme Court, U. S.
FILED
JAN 8 1981
MICHAEL RODAK, JR., CLERK

No. 80-5861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KENNETH RAY WILLIAMS,
Petitioner,

vs.

KENNETH RAY LUCKY,
Respondent.

(IN THE INTEREST OF KENNETH RAY WILLIAMS)

Petition for a Writ of Certiorari to the Texas Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF AMICUS CURIAE FOR JOYCE WASHINGTON, HER MINOR CHILDREN, AND THE NATIONAL CENTER FOR YOUTH LAW.

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No. 80-5861

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KENNETH RAY WILLIAMS,
Petitioner,

vs.

KENNETH RAY LUCKY,
Respondent.

(IN THE INTEREST OF KENNETH RAY WILLIAMS)

Petition for a Writ of Certiorari to the Texas Court of Civil Appeals for the Fifth Supreme Judicial District of Texas

BRIEF AMICUS CURIAE FOR JOYCE WASHINGTON, HER MINOR CHILDREN, AND THE NATIONAL CENTER FOR YOUTH LAW.

INTERESTS OF AMICI CURIAE*

Amicus curiae Joyce Washington is the mother of four minor children, two of whom are illegitimate: Ray Washington, born on June 6, 1978, and La Quentis Washington, born July 26,

---

*Written consent for the filing of this Brief **Amicus Curiae** signed by counsel for both Petitioner and Respondent has been filed with the Clerk of the Court pursuant to Supreme Court Rule 42(2).

1979. In October, 1980, shortly after the Texas Supreme Court denied petitioner Kenneth Ray Williams' application for writ of error, Ms. Washington sought legal assistance from the Dallas Legal Services Foundation, Inc. She hoped to bring a support action against the putative father on behalf of her children, but was told such an action would be dismissed automatically, since it would be barred by Section 13 of the Texas Family Code.

Ms. Washington and her children have a direct interest in the outcome of this litigation. Should the Court refuse to grant petitioner's request for a Writ of certiorari, Ms. Washington will be forever barred from seeking support from the biological father of these two children. She, therefore, supports the position of petitioner Kenneth Ray Williams.

The National Center for Youth Law, formerly the National Juvenile Law Center of St. Louis, Missouri, and the Youth Law Center of San Francisco, California, is a national legal services support center funded by the federal Legal Services Corporation for the express purpose of protecting the rights of indigent children. Center attorneys have appeared as counsel before this Court in cases dealing with juvenile court proceedings *[Breed* v. *Jones,* 421 U.S. 519 (1975); *The Oklahoma Publishing Co.* v. *The District Court of Oklahoma County,* 430 U.S. 308 (1977)], with public education *[Lau* v. *Nichols,* 414 U.S. 563 (1974)], and with rights and procedures touching the parent and child relationships *[Lassiter* v. *Department of Social Services of Durham County, North Carolina,* No. 79-6423, *cert. granted,* 49 U.S.L.W. 3245 (10/6/80)]. Center attorneys have also been involved in litigation in several states raising issues related to establishing paternity. Because of this involvement, they actively monitor all state decisions in the field and study state statutory provisions that affect the rights of children seeking support. In addition, they maintain files on current medical developments that directly relate to questions of proof in paternity proceedings.

For these reasons, the Center believes that its participation in this litigation will assist the Court in resolving the important issues raised in the petition for writ of certiorari filed on behalf of Kenneth Ray Williams.

ARGUMENT

I

The One Year Statute Of Limitations Established By Section 13.01 Of The Texas Family Code Is Not Reasonably Related To Permissible State Policy Interests.

A. Introduction.

In *Texas Department of Human Resources* v. *Chapman*, 570 S.W. 2d 46 (Tex. Civ. App. 1978), the Texas Court of Civil Appeals held that V.T.C.A., Family Code §13.01[1] (Supp. 1980-81) did not deny illegitimates equal protection of the law. That opinion was reaffirmed in this case. *Williams* v. *Luckey*, 599 S.W.2d 108 (Tex. Civ. App. 1980).

The decision rested upon the court's conclusion that a requirement that a paternity suit be initiated within one year from the child's birth was reasonably related to a legitimate state interest. The court identified the purpose of the statute as compelling the exercise of a right "within a reasonable time, so as to afford the opposing party a fair opportunity to defend while the evidence is readily available." 570 S.W.2d at 49. It further suggested that the danger of fraud may increase as the time between the child's birth and the initiation of a suit lengthens. A defendant's problem of proof also increases substantially with the passage of time, according to the court. 570 S.W. 2d at 49.

Assuming for purposes of this argument that the court utilized the appropriate equal protection test when it limited its inquiry to whether the statute in question was reasonably related

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[1]Section 13.01 provides:

A suit to establish the parent-child relationship between a child who is not the legitimate child of a man and the child's natural father by proof of paternity must be brought before the child is one year old, or the suit is barred.

to permissible state interests,[2] the court reached the wrong conclusion.

First, the court failed to acknowledge the overly broad nature of the statute. Second, the court neglected to recognize the very valid state interests directly jeopardized by the existence of the statute.

B. The One Year Statute Of Limitations Constitutes An Overly Broad Restriction On The Rights Of Illegitimates.

The court below held that a one year statute of limitations is reasonably related to the state's interest in minimizing the danger of fraud in paternity suits. The court, however, failed to consider whether other less restrictive methods exist for minimizing fraudulent claims while permitting the litigation of valid claims.

In *County of Lenoir ex. rel. Cogdell* v. *Johnson,* 264 S.W. 2d 816 (N.C. App. 1980), this problem was discussed. At issue in *Cogdell* was a statute of limitations prohibiting initiation of a proof of paternity suit after three years from the child's birth or three years from the date of the last support payment by the putative father.[3] In reaching its conclusion that the three year statute offended the equal protection clause of the fourteenth amendment, the court applied the substantial relationship test. The court specifically rejected the defendant's argument that the statute of limitations had a substantial relationship to the state's interest in preventing the litigation of stale or fraudulent claims. With respect to stale claims, the court noted that if a child is entitled to support from his father throughout the period his minority, no claim brought for support during that period can be considered stale. 264 S.W.2d at 821.

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[2]In Part I of his Petition for Writ of Certiorari, petitioner asserts the substantial relationship test should be utilized when scrutinizing classification based on illegitimacy. *Amici* agree with petitioner's analysis.

[3]Under this statute which allowed suit within a three year period, petitioner would have had a justiciable claim.

Similarly, an arbitrarily designated statute of limitations absolutely bars fresh as well as stale claims. For example, an out of wedlock parent could voluntarily support a child from birth until the child is several years old. At that point, the parent would be immune from litigation aimed at obtaining further support. It is also quite possible that a father could live with the mother of his child, without benefit of marriage, for several years only to leave and disclaim all financial responsibility for the child. The claims for support in each of these examples would not be stale, yet would be prevented by the statute of limitations.

There is also little reason to expect that claims in the hypothetical cases mentioned above would be fraudulent, since the fathers contributed to support of the children for a period of years. *See J.L.P.* v. *C.L.B.,* 107 Daily Wash. L.Rep. 401, 406 (Super. Ct. D.C. 1979). Further, scientific developments of recent years significantly diminish the possibility that any fraudulent claims could result in an erroneous finding of paternity.

In the instant case, the action for support was brought on October 25, 1978, slightly more than two months after the one year statute of limitations had tolled.[4] Is this action *per se* stale because it is fourteen months old? That the answer must be negative is underscored by the fact that certain states recognize no limitation on initiating paternity actions while others establish arbitrary limits of different lengths. *See e.g., Cogdell, supra* (three year statute of limitations rejected as violative of equal protection); *State Department of Health* v. *West,* 378 So.2d 1220 (Fla. 1979) (four year statute of limitations rejected); In re *People in Interest of L.B.,* 498 P.2d 1157 (Colo. 1972), *cert. denied,* 410 U.S. 976 (1973) (five year statute of limitations upheld).

In the past, courts have rightfully been concerned that paternity suits initiated long after the birth of the child could result in

[4]The petitioner in this case was born on August 21, 1977.

major evidentiary problems for the defendant. The Maryland Court of Appeals suggested that it would be difficult for an accused male to establish that others had sexual contacts with the female at or near the time of conception after a period of several years because (1) in today's society, people move frequently and witnesses might, therefore, be unavailable; and (2) changes in family circumstances might cause certain witnesses to be unwilling to admit sexual intercourse after many years. *See Thompson* v. *Thompson,* 404 A.2d 269, 273 (Md. 1979).

Scientific tests now available make proof of sexual contacts virtually unnecessary to a defense of non-paternity. For several years, Human Leucocyte Antigen (HLA) typing has been a valuable tool in excluding, with a very high degree of certainty, the possibility of paternity. *See* Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing,* 16 J. OF FAM. L. 543 (1978).

Justice Tamura in *Cramer* v. *Morrison,* 88 Cal. App.3d 873, 153 Cal. Rptr. 865, 867 (1979) explained the differences between conventional blood grouping and HLA and the reasons for HLA's reliability:

> The HLA test is not the typical test based on red blood cell grouping...to exclude men from parentage. The test is based on tissue typing of the white blood cells.... The test has gained wide acceptance for kidney transplantation and is universally used for that purpose in the United States and Europe. There is a great difference between red blood cell testing and HLA tissue typing. Red blood cell grouping involves only a small number of variables or factors, so that while a man may be conclusively ruled out as a father, on the results of such tests proof that he *is* the father is very inconclusive, ordinarily involving only a 50 to 60 percent probability that the man is the father. HLA testing on the other hand, involves a much larger number of factors, antigens in the white blood cells, so that proof of parentage is much more conclusive, usually involving a 98 percent probability that the man is the father.

Further the HLA system has the advantage of being constant:

> The HLA system...reaches full expression long before birth, has been detected even in mummies, and, as far as it is known, is unaltered by environmental effects, such as massive blood transfusions, drugs and onset of disease. Furthermore, the detection techniques for HLA are readily performed and reliable.

Terasaki, *Resolution by HLA Testing of 1000 Paternity Cases Not Excluded by ABO Testing* 16, J. OF FAM. L. 543, 554 (1978).

The galloping technology in this area should lay to rest reliance upon the inexact evidence often employed in paternity proceedings:

> Theoretically, it is possible to exclude all non-fathers by utilizing some 62 known genetic systems, and conversely the actual father could be detected with virtual certainty. However, the enormous cost of performing all of these tests along with the rarity of some reagents makes their use for routine testing in disputed parternity cases completely unrealistic. It will thus be impractical to insist upon 100% inclusion of paternity. However, in contrast to the subjective evidence upon which paternity is now often determined, tests such as HLA typing which generally provide high probabilities of paternity should certainly be preferred by the courts.

Id. at 554.

That HLA typing is not merely a new scientific theory is evidenced by the fact that a growing number of state courts are admitting the results of these tests as proof of paternity because the tests are generally accepted in the scientific community. *Cramer* v. *Morrison,* 88 Cal. App. 3d 873, 153 Cal. Rptr. 865, 868 (Cal. App., 4th Dist. 1979); *County of Fresno* v. *Fresno County Superior Court,* 154 Cal. Rptr. 660, 662-63 (Cal. App.,

5th Dist. 1979); *Michael B.* v. *Super. Ct. Stanislaus Cty.*, 86 Cal. App.3d 1006, 150 Cal. Rptr. 586, 588 (Cal. App., 5th Dist. 1978); *Malvasi* v. *Malvasi*, 167 N.J. Super. 513, 401 A.2d 279, 280 (N.J. Super., Chancery Div. 1979); *M.* v. *S.*, 169 N.J. Super. 209, 404 A.2d 653, 656 (N.J. Super., Law Div. 1979); *Carlyon* v. *Weeks*, 387 So.2d 465, 467-68 (Fla. App., 1st Dist. 1980); *Simons* v. *Jorg*, 384 So. 2d 1362, 1363 (Fla. App., 2d Dist. 1980); *Commonwealth* v. *Blazo*, 406 N.E.2d 1323, 1326 (Mass. App. 1980); *State* v. *Meacham*, 93 Wash. 2d 735, 612 P.2d 795 (Wash. 1980). *C.f.*, *Hepfel* v. *Bashaw*, 279 N.W.2d 342, 347 (Minn. 1979) (court recognized importance of HLA typing but the question of admissibility was not before it); *Cogdell, supra* at 821 (court questioned need for statute of limitations when HLA typing is available); *Goodrich* v. *Norman*, 100 Misc. 2d.33, 421 N.Y.S. 2d 285, (Fam. Ct. 1979) (court recognized scientific acceptance of HLA typing but admissibility was not before it) *Phillips By and Through Utah, etc.* v. *Jackson*, 615 P.2d 1228 (Utah. 1980) (the court refused to admit HLA test results because the proponent failed to adequately prove general acceptance in the scientific community). *See also* Wayne, *HLA Blood Tests: Pinpointing Paternity*, 2 CRIM. JUST. J. 35(1978); *Joint AMA-ABA Guidelines: Present Status of Serologic Testing in Problems of Disputed Parentage*, 10 FAM. L. QUART. 247 (1976) (report recommends inclusion of HLA typing in battery of tests used in disputed parentage cases.)

Because of the reliability of HLA typing for disproving fraudulent claims, the North Carolina Court of Appeals in *Cogdell, supra* at 821, has questioned the usefulness of a statute of limitations for paternity at all:

> The need for a statute of limitations in civil paternity actions must especially be questioned in light of advances which have recently been made in blood typing, such as the HLA typing test which in combination with other tests, had been determined to be between 95.4 and 99.4 percent accurate.

Society demands that the law should progress as the attitudes and values of society change. *See* Holmes *"The Path of the Law,* 10 HARV. L. REV. 457 (1897). So also should the law adapt to advancing technology. No longer should courts be shackled to the routines of the past in such an important area. If courts accept the probative values of HLA testing, they then have no rationale for justifying a statute of limitations which would prohibit the initiation of such proceedings. While these statute were necessary to insure that evidence is fresh, medical science can now determine the HLA type of mummies. Clearly, HLA evidence is always fresh.

Because statutes of limitations have only an arbitrary relationship to staleness of claims, and because fraudulant claims can readily be identified by new scientific developments such as HLA testing, these interest bear no "rational relationship" to Section 13.01 of the Texas Family Code.

C. Substantial And Rational State Interests Are Significantly Hampered By The One Year Statute Of Limitations Of Section 13.01 Of The Texas Family Code.

Balanced against any state interest in preventing the litigation of stale or fraudulent claims is the more important state interest of "preventing, whenever possible, illegitimate children from becoming public charges." *Cogdell, supra* at 821. As is pointed out in Part III of the Petition for Writ of Certiorari, the number of illegitimate births in the country is rising. Many of these children are welfare recipients.

The significance of this problem is evidenced by the Congressional action that resulted in the passage of 42 U.S.C. §602(a)(26) (1976). That provision requires that a state plan for aid and services to needy families with children *must* require that applicants for aid assign to the state any rights to support the applicant may have on behalf of his or her children *and*

cooperate with the state in establishing paternity and obtaining support for an illegitimate for whom the applicant is seeking aid. 42 U.S.C. §602(a)(26) (1976). *See also* 42 U.S.C §654 (4) (1976) which requires that state agencies look beyond their own boundaries when necessary to obtain support for a child from an absent parent. Failure to follow these requirements can result in loss of federal aid to the state. 42 U.S.C. §604 (1976).

Statutes of limitations serve to frustrate the state goal of making persons responsible for the birth of a child equally responsible for its support during minority. One practical result of the challenged Section 13.01 is that it enables putative fathers to escape the financial responsibility of supporting the children they have sired. Concomitantly, taxpayers must assume that burden. In the instant case, the petitioner's mother assigned his support rights to the Texas Department of Human Resources so as to be eligible to receive welfare payments in compliance with federal and state law requirements. Because this action is barred by a one year statute of limitations, the total cost of the petitioner's support will be borne by the taxpayer rather than by the child's biological father.

CONCLUSION

Because the state interests asserted in this case have no rational relationship to the statute in question, and because important state interests are compromised by the statute, *Amici* urge this Court to grant the petition for writ of certiorari sought by Kenneth Ray Williams.

Respectfully submitted,

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Certificate of Service

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